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United States Court of Appeals

FOR THE SECOND CIRCUIT.

No. 24,295.

McALLISTER LIGHTERAGE LINE, INC.,
Plaintiff-Appellee,

against

INSURANCE COMPANY OF NORTH AMERICA, and SCOTT PAPER COMPANY,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK.

APPENDIX OF PLAINTIFF-APPELLEE.

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SECOND CIRCUIT

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APPENDIX.

Excerpts From Transcript of Testimony.

Deposition of WILLIAM V. KANE, an officer of the Scott Paper Company before trial:

* * * * * * *

(29) "Q. Was it your expectations that Mr. Church would accompany the scow, either aboard the scow or aboard the tug? A. Most certainly.

"Q. On the trip from Wilmington? A. Most certainly.

"Q. To the destination? A. Yes, sir."

* * * * * * *

Deposition of WILLIAM HENRY BAIRD, an officer of the defendant Insurance Company of North America, before trial.

* * * * * * *

(73) "Q. Well, do I correctly understand that you had two telephone conversations with the insurance broker in relation to the placing of this insurance? A. That's right.

"Q. In the first conversation you were requested to agree to insure the vessel? A. That is correct.

"Q. But you did not agree to do it? A. Not until I had checked on the vessel.

"Q. I take it then that whatever your words were, you conveyed to the broker that you would not issue (74) this insurance in connection with this vessel until you had checked on it; is that right? A. That is correct.

"Q. And before you issued the insurance you communicated with an employee in New York of the Insurance Company of North America? A. That is correct.

Deposition of William Henry Baird.

"Q. And it was after he had reported certain information to you that you were willing to write the insurance? A. That is correct.

"Q. And it was not until you had received that information from the man in New York that you agreed to write the insurance? A. That is correct.

"Q. And the person whom you called in New York was Mr. Hansen? A. That is correct.

"Q. And he is a surveyor for the Insurance Company of North America? A. That's right.

"Q. Do you frequently confer with him in connection with the question of whether you will or will not issue insurance in connection with vessels? (75) A. Yes, it is a very common practice to consult with Mr. Hansen.

"Q. Do you ever agree to insure a vessel without consulting Mr. Hansen on a vessel which is in the New York or Philadelphia area? A. Yes, at times Mr. Hansen is not available. Generally our practice is that we will not insure a vessel until Mr. Hansen or some other qualified marine surveyor has seen the vessel.

"Q. Why do you follow that practice? A. Well, it is a common practice in the hull business to obtain a survey on any vessel before we accept insurance so that we have an up-to-date report as to the present condition of the vessel before we go under risk.

"That survey report will give us an indication of the value of its present condition and any known damages which might exist, whether she is suitable to carry the cargo which they intend to put on it, and it is usually not an acceptable risk until we have the approval of our surveyor."

William V. Kane, for Defendants—Direct—Cross.

(86) WILLIAM V. KANE, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct examination by Mr. Kildare:

* * * * * * *

(112) Q. Who was P. F. Martin, Incorporated with reference to an contract that Scott Paper Company had? What was Martin called upon to do? A. P. F. Martin was a towing contractor. We had handled movements up and down the Delaware River.

Q. Did you have a contract with them? A. Yes.

Q. And it was prior to August 1953? A. It ran on a yearly renewal basis.

Q. And on the strength of that contract what was your practice with reference to calling on Martin to supply tugs? A. It was—all I had to do was pick up the phone and call their dispatcher and tell him I had a (113) barge to either go out of Chester or come back to Chester, and they would confirm it, the pickup time, et cetera, and go ahead and make the pickup.

Q. Who was the dispatcher? A. One of them was Tony Clark and the other was Mr. Roy Rickard, who is also I think acting as general manager of P. F. Martin.

(143) Q. In any event, sir, you did hear Carter ask Church to ride up and report on the performance, is that correct? A. Yes, sir.

* * * * * * *

(158) *Cross examination by Mr. Heckman:*

* * * * * * *

(160) Q. Alec Carter is a man who has died since this event? A. Yes.

Q. And he was your immediate—he was the next in line below you, is that right? A. Yes.

Q. And he was the boss of Sam Church? A. Yes, sir.

Q. And was Carter a man who had had considerable experience on vessels of this type? A. Yes, sir.

. . . . . .

(161) Q. Now, then, the man who looked at the scow when she arrived at Wilmington before one bit of cargo was put on her was Alec Carter? A. Yes, sir.

Q. The same man whom you had taken to New York to look at her because of his qualifications in looking at scows, is that right? A. Yes, sir.

Q. And you received a report from Alec Carter after he had looked at the scow in Wilmington, didn't you? A. Yes, sir.

Q. And after you received that report you went ahead and told the Wilmington people to load the paper on it? A. Yes, sir.

Q. Would you give the Wilmington people an order to load paper on a scow that you did not consider to be a good one? A. No, sir.

. . . . . .

(170) Q. Would you say that you considered it one of Church's duties to operate the pump or pumps on the scow *McAllister 58* if they were required on the trip from Wilmington to Chester? A. Yes, sir.

Q. And he was the only man of the Scott Paper (171) Company who had any responsibility to perform that duty of using the pumps in connection with the *McAllister 58*?

. . . . . .

(173) The Witness: I would like to say no partly on this matter. The captain of the scow 58 is not a title or a paper captain; he is strictly a layman that we indoctrinate into handling barges. It is his duty while loading to protect the scow in the sense of protesting and stowing the load while the loading is under way.

. . . . . .

Joseph C. Cathcart, for Defendants—Direct.

Harold H. Howard, for Defendants—Direct.

(188) JOSEPH C. CATHCART, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct examination by Mr. Kildare:

. . . . . .

(190) Q. Well, with particular reference to the period in August 1953, what were the general relationships businesswise that you were engaged in with reference to Scott? A. Well, we were—Scott Paper Company would consign to us various vessels laden with wood pulp, and the vessels would dock at our facilities and be unloaded, and we would place the wood pulp into storage.

. . . . . .

(192) Q. Now, Mr. Cathcart, are you familiar with the visit which was made to your dock in August 1953 of a wood scow called the *McAllister No. 58*? A. I am.

Q. The answer is yes? A. Yes.

Q. Speak up. Do you know when that vessel arrived at that facility? A. Yes. At approximately 10:30 P. M. on August 25, 1953.

. . . . . .

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(229) HAROLD H. HOWARD, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct examination by Mr. Kildare:

. . . . . .

Q. By whom are you employed at the present time? A. P. F. Martin, Incorporated.

Q. Of what city? A. Philadelphia.

. . . . . .

(233) Q. Who gave you your orders to proceed to Wilmington? A. The dispatcher at our office. One of the dispatchers.

Q. What is his name? A. I don't remember whether it was Mr. Rickard or Mr. Clark. I don't remember which one now. One or the other.

Q. Rickard or Clark? A. Yes.

* * * * * *

(246) Q. All right. In any event, at the time when the mate made this report to you, the pump was not running, is that correct? A. That is right.

Q. The pump was not running then. All right. What steps did you take at that time with reference to the 58? A. Well, we tried to get the engineer over. The mate went over, the oiler, I believe, and the deckhand—quite a few men went over and tried to get it started.

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(292) GEORGE L. DAHM, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

Direct examination by Mr. Kildare:

* * * * * *

(311) Q. Yours. Will you tell us, please, the reason that you discharged him?

* * * * * *

A. I felt that Mr. Church had directly violated a rule of the department which required him to be on the barge all the time it was away from Chester. That (312) is our normal procedure. And in this case we took the barge at Wilmington. So Mr. Church was sent down to Wilmington to take charge of the barge at Wilmington. It was his responsibility to see that the barge was properly loaded and tied up at all times and then to ride the barge back to the

George L. Dahm, for Defendants—Cross.

Chester plant to insure that it was properly secured to our Chester plant dock. He didn't do that. He drove his automobile from Wilmington, and I felt that that violation of our rules that was involved was sufficient reason to discharge him from the plant.

(319) *Cross examination by Mr. Heckman:*

(320) Q. Do you know and did you know in August of 1953 that wooden vessels leak? A. Yes, sir.

(322) Q. Was Church to serve as the crew of this vessel? A. Mr. Church was assigned to the vessel primarily for the purpose of loading and security while the barge was tied up at the dock.

Q. Well, I didn't ask you that, sir; I asked you if he was assigned as the crew of this vessel? A. He was the crew.

Q. Was he the man who was assigned to take care of leakage which might develop during loading or while in tow? A. Yes, he was.

(323) Q. Who was hired and paid by the Scott Paper Company to act as the crew of this vessel to take care of leaks? A. Sam Church.

Q. And that was his job and he was the only man of Scott Paper Company who was supposed to do it, is that right? A. He was the only man from Scott Paper Company.

Q. And he was supposed to ride the boat so he could do it? A. That is right.

Samuel T. Church, for Defendants—Direct.

(324) SAMUEL T. CHURCH, called as a witness on behalf of defendants, being duly sworn, testified as follows:

Direct examination by Mr. Kildare:

• • • • • • •

(326) A. That is a steel barge. A wooden barge I never had anything to do with. I never had any experience with wood barges.

• • • • • • •

(330) Q. When you first received any orders to go down to Wilmington? In other words, was it the same day or was it some other day? A. The night before they told me to come into the plant and do some shifting, in Scott's. That was on Wednesday night. They told me to come in Thursday morning and make some shifts for two Scott Paper——

Q. Who told you? A. Alec Carter.

Q. Alec Carter? A. Yes, sir.

Q. That is, on Thursday he told you, the 27th, the day she sank? A. Wednesday night he told me to come in to the (331) plant of Scott Paper Company the next morning, that would be on Thursday morning, to help do some shifting around there and after I got the shifting done he wanted me to go down to Wilmington, down to the Wilmington Terminal.

Q. When did you first go to Wilmington? Was it on Thursday? A. On Thursday morning after I got my work finished at Scott Paper Company.

Q. What time did you arrive at the Terminal that day? A. Around 10.30.

Q. In the morning? A. That is right.

• • • • • • •

(348) Q. What was the conversation?

• • • • • • •

A. When Captain Howard came up I said, "Captain Howard, I will meet you in Chester. I will take the (349) car and meet you up in Chester."

Gustave Hansen, for Defendants—Cross.

Q. How were you going to get from Wilmington to Chester that day? A. You mean how was I going to get from Wilmington to Chester?

Q. Yes. A. I drove the car back.

Q. You drove your car back? A. Yes.

* * * * * *

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(403) GUSTAVE HANSEN, called as a witness on behalf of the defendants, being duly sworn, testified as follows:

* * * * * *

(467) *Cross examination by Mr. Heckman:*

Q. How many boats do you own, Captain Hansen? A. None.

Q. How many? A. None.

Q. None? How many have you sold that you owned? A. I haven't sold any.

Q. So you never owned a boat in your life? A. No, sir.

Q. Would you like to own a boat? A. No, sir.

Q. (Continuing) That was under contract, under which, with no expense to the owner, the owner would receive $650 a month charter hire? A. Yes, I would.

Q. That would be in ten months $6500, wouldn't it? A. That is right.

Q. And in 12 months, $7800? A. That is right.

Q. And you say that in your opinion this boat which in one year without a bit of expense to the owner would earn $7800, was in your opinion worth only $7500? A. Market value, yes, sir.

(467) Q. That would have been a good buy, to spend $7500 (468) for a boat that within one year with no expense would give you $7800? A. That is all in my opinion that boat had in value.

Q. You were called up by the underwriter for the Insurance Company of North America in Philadelphia before he agreed to insure this boat, weren't you? A. Yes, sir.

Q. And he wanted to get your advice on the question of insurance, didn't he? A. He wanted to get my advice on the question of insurance and condition of the vessel.

Q. Did he tell you how much the vessel was to be insured for? A. I don't believe he did. I can't recall.

Q. Well, it is the usual and customary thing, isn't it? A. Yes, it is. So he could very well have said that to me.

Q. Do you know that your company after you had made a report signed an endorsement to a policy in which they agreed to include this vessel in the policy issued to Scott Paper Company? (469) A. Yes, I know that

Q. Do you know that that endorsement contained the agreed valuation of $20,000 on this scow? A. I knew that the vessel was insured for $20,000.

Q. And that was agreed to by the underwriter for the Insurance Company of North America? A. That is right.

Q. And he insures a lot of wooden boats, doesn't he? A. Yes.

Q. And the Insurance Company of North America has a great deal of experience with wooden boats, don't they? A. Yes, we have.

Q. And that underwriter of yours is a very experienced man, isn't he? A. Yes, he is.

Q. One of the best in the business? A. Well, I will say he is a good underwriter.

Q. And you knew he agreed to the $20,000 valuation? A. That is right.

Q. Is it a fact that the words "master" and "captain" are used synonymously? A. Yes.

(470) Q. The master is the captain and the captain is the master? A. That is right.

(470) Q. Now, Mr. Kildare asked you if you heard certain testimony that went on here before. Did you hear the captain, the P. E. Martin captain of the Martin tug McAllister Brothers testify that he towed that scow stern first? A. Yes, sir.

Q. And did you hear him say that he did that because the stern was higher than the bow? A. Yes.

Q. And did you hear Mr. Cathcart of the Wilmington Terminal Company say that when loading was completed she was lower at the stern than she was at the bow? A. I heard that, too, yes, sir.

Q. Now, do you have that piece of oakum there?

Mr. Heckman: Yesterday that was marked for identification. I would like to offer it in evidence.

Mr. Kildare: If the Court please, will that now be marked a plaintiff's exhibit?

The Court: It is marked now for identification.

(471) Mr. Kildare: It has some letter.

(Discussion between Court and counsel.)

(Defendants' Exhibit I for identification received in evidence.)

Q. You testified that the first time you saw this *McAllister 58* was on a day subsequent to her sinking? A. Yes, sir.

Q. And she had been hauled out on this marine railway? A. Yes, that is right.

Q. And you said that among the damage that you saw, you observed that the vessel was out of alignment? A. Yes.

Q. Will you tell us, please, what you mean by out of alignment? A. She was in a twisted condition which I assume had occurred as a result of the sinking.

Q. That is a common condition to find after a vessel has been loaded and as she starts to sink careens from side to side and throws part of her load off and sinks? A. Yes, sir.

(472) Q. That puts a strain on the structural members of the vessel which causes those structural members to be resilient? A. Yes.

Q. When you say twisted, does that mean, if we assume that this pad represents the whole structure of the scow, that the front end was moved over to the right or left of the stern end? A. No. In this particular instance, if you will let me have the pad I will demonstrate to you what its position was like. Assuming that this is the bow, and the

stern of the vessel (indicating), this is just about the condition of the vessel. The stern wasn't only down this way, but also twisted in that condition so that one corner was considerably lower than the other.

Q. Now, you don't want anyone to think that that condition existed before this accident? A. No, sir.

Q. Now, besides, that, it is a fact, isn't is, that after a scow of this kind has been used for some period of time, it would acquire what is called a hog? A. Yes.

Q. Did you observe whether or not this vessel as (473) a result of her normal use had acquired a hog? A. I didn't observe that because she has a considerable sheer.

Q. A hog is a normal thing to find in a scow that has been used for some period of years? A. Frequently, yes, we find it.

Q. And the word "hog" refers to the fact that although the corners are even and level, there is a slight rise in the middle, or actually the ends have fallen down slightly? A. That is correct.

Q. So that the deck of the scow and the structure of the scow resembles a pig's or a hog's back? A. That is right.

Q. Higher in the middle than on either end? A. That is correct.

Q. You wouldn't be at all surprised to find that that condition existed in a scow of this type? A. No, sir.

Q. Now, you made up a list of the items which required repair as the result of this sinking, did you not? A. Yes, sir.

Q. And is it correct that that list is referred to as a survey or survey report? (474) A. Yes, sir.

Q. And it sets forth the damages which in your opinion and in the opinion of the others who joined with you in this report resulted from the sinking and from the work of raising her up from the bottom and getting her to the dry-dock, is that correct? A. That is correct.

Q. Because when they raise a vessel from the bottom they generally come along with a derrick and put wire slings underneath it, is that right? A. That is correct.

Q. And that causes a certain amount of damage? A. Very often.

Q. And then when the vessel is hauled out on the dry-dock or on the marine railway she still has water in her, and they will knock off some bottom planks to let the water run out? A. That is right.

Q. And that is considered as an item of repair necessary because of the accident, is that right? A. That is correct.

Q. Now, based on this experience you have told us about, are you familiar with the cost of repairing vessels of this kind? (475) A. Yes, sir, I am.

Q. Did you form an opinion as to the cost of repairing the damage to this scow attributable to the sinking and the raising? A. Yes, sir, I did.

Q. And did you reach an agreement with the other surveyors on that subject? A. Yes, sir.

Q. And did you make a report to the Insurance Company of North America? A. Yes, sir.

Q. What in your opinion was the cost of repairing the damage? A. $23,456.

Q. In other words, that is what somebody would have to spend to put this boat back in the condition she was in before the accident? A. Yes, sir.

Q. Now, when you were giving your opinion about how these tails of oakum got into the condition that you saw, I suppose you were basing it on having seen the same condition on other vessels? A. Not the condition that I observed there on that vessel.

(476) Q. Of course, you couldn't see that condition before because it was on that scow, but had you seen similar conditions on other vessels? A. No, not identically the same; no.

Q. I didn't ask you if they were identically the same; did you see similar conditions? A. I have seen short tails, oakum tails, and long tails on the bottom of scows, yes, sir.

Q. So, once in a while the caulkers working for a shipyard will miss a little spot doing the caulking? A. That is right.

Q. You have heard about the fact that caulkers work as far as they can until they get close to these dog blocks and then it becomes necessary for the shipyard to lower the dock into the water so that the boat will float in it, and they then move it over so that it is in a different spot? A. Yes.

Q. That is all taken care of by the shipyard? A. That is shipyard practice.

Q. It is the same as when you turn your car over to a garage man for lubrication; he puts it up on the rack and takes it down again? A. Yes.

(477) Q. I mean, the owner has nothing to do with it; it is the shipyard that decides that? A. I agree with you.

Q. Do you say you agree with me? A. Yes.

Q. I thought so. Did you say that there were 98 bottom planks on this boat? A. No, I don't think I did. I said 98 seams that would have 97 bottom planks.

Q. All right, 98 seams. So if we consider this pad the bottom of the boat and let us say this end is the stern? A. Which end?

Q. Where my right hand is. A. All right.

Q. And if we had the boat turned lying on its side and were looking at it, these blue lines would represent the seams in the bottom of the boat? A. That is right.

Q. And we disregard this red line? (Indicating.) The seams run from one side of the boat to the other? A. That is right, the full width of the boat.

Q. And the planks are 12 inches wide? A. Yes.

(478) Q. There is a seam in between each plank? A. Yes, sir.

Q. And just one little spot that the caulkers missed was in one of these seams, the sixth or seventh from the bow; is that right? A. That is correct.

Q. And was it the sixth or seventh? I forget. A. It was the seam between the sixth and seventh plank.

Q. Well, if you will take my word, if you can't see, that X is on the sixth line? A. All right.

Q. That is about where it was? A. That is right.

Q. And it was about in the middle of the vessel? A. Yes.

Q. In the middle of the vessel bottom? A. Yes, close to where the keel blocks are.

Q. That is supposed to be in the middle? A. Just about the centerline of the vessel.

Q. Now, that whole seam in that one block was 32 feet long? A. That is right.

Q. All of it was properly and newly caulked except (479) how much? A. 18 inches.

Q. So we had a total in that one seam alone of 384 inches, is that right? A. That is right.

Q. And of that 384 in one seam 18 inches had been missed by the caulkers? A. That is correct.

Q. Then we have 98, did you say, seams on the bottom? A. I think that was what I said.

Q. Each one of those being—did you want to check that? A. Well, either 97 or 98 seams.

Q. All right. And each one of those of course is 32 feet across or long? A. Yes.

Q. Which means 384 inches? A. Yes.

Q. So on the entire bottom of the boat, just on the bottom there were 37,608 inches of seam being caulked, weren't there? A. Yes, sir, or 3136 feet of seams.

Q. That is right. And if you want to make it (480) inches, it was 37,608? A. Yes.

Q. And all you could find wrong there was 18 inches of seam where the caulkers missed it? A. That is right.

Q. Now, that is less than 12/1000 of the bottom work? A. That is right.

Q. So that the bottom so far as the caulking was concerned was better than 99 per cent perfect, isn't that so? A. That is right, just like a chain with its weakest link.

Q. Have you ever had a house painted? A. Oh, yes, indeed.

Q. Do you know what the word "halt" means to painters? A. Indeed, I do.

Q. What does the word "halt" mean to painters? A. It just means that a portion of the work that should have been painted was left unattended.

Q. And he missed it? A. He missed it.

Q. Where he dipped down with the brush and he didn't (481) get back to where he started? A. Yes.

Q. And that is what happened with this caulking? A. Exactly.

Q. That is a condition that is likely to occur at any time, isn't it, in caulking? A. Yes, sir, that does occur every now and then.

Q. Now, besides these seams on the bottom we were talking about, the end planks were caulked, is that right? A. Yes, sir.

Q. And the side planks were caulked? A. That is right.

Q. And the end planks are 32 feet wide? A. Yes.

Q. How many seams are there in the ends of the boat? A. 15 planks on each end.

Q. So by multiplying that by 32 and then by 12 you get the number of inches there that have been caulked? A. Yes.

Q. And the side planks—one was longer than the other because the vessel was raked at both ends? It slanted in? A. Yes.

(482) Q. But the average length of the side planks would be a little over 100 feet? A. That is right.

Q. Of course, you can't get a plank 100 feet long; so they are broken up into 30-odd feet? A. Yes.

Q. But the seam would be a little over 100 feet long between each course or side plank? A. Yes.

Q. How many of those are there from top to bottom? A. 12 seams from top to bottom on each side.

Q. So on the basis of all the caulking in the boat, this little 18 inches you talked about was a very, very, very minute fraction of the caulking work? A. That is right.

Gustave Hansen, for Defendants—Cross.

Q. Now, even though there were 18 inches where the caulkers hadn't done a 100 per cent perfect job, water couldn't enter through the entire 18 inches, could it? A. No.

Q. Because these bottom planks are fastened to those keelsons that you were talking about? A. That is right.

Q. And a keelson is a big square timber? (483) A. 8 inches by 12 inches, and it set on edge so that the 8-inch face was down against the top side of the bottom planking.

Q. So of that 18 inches opening the only space through which water could enter was on either side of this 8-inch keelson? A. On the one side of the 8-inch keelson.

Q. For what distance? A. 10 inches.

Q. 10 inches, all in one side? A. Well, a little bit to the other side, too. In fact, most of it to the port side.

Q. And this opening was one-eighth of an inch wide, I think you said? A. Yes. I estimated it to be about one-eighth of an inch wide.

Q. Don't you always carry a ruler with you? A. Well, I didn't go inside and measure it but I just judged by the thickness of the probe that I had put in the seam.

Q. That is the probe that was offered in evidence or marked for identification yesterday, and I take it you used the sharp end? A. Yes.

(484) Q. Well, the end of that probe is not one-eighth of an inch wide? A. I know it isn't.

Q. So because you were on the outside and could insert this up to the inner side of the plank, you estimated that the opening in the plank was one-eighth of an inch wide? A. Yes.

Q. Can you measure the end of that probe for thickness? A. Well, I can calculate it.

Mr. Kildare: Let him finish.

Q. I am sorry. A. I would say that is about one-sixty-fourth there.

Q. One-sixty-fourth? A. Yes.

Q. And you estimated that the opening was eight times the size of this? A. Well——

Q. Did you? A. Yes, I did.

Q. You didn't go in to look at it and measure it, did you? A. No, sir, I didn't.

(485) Q. You could have done that, couldn't you? A. Yes, but I didn't consider it necessary.

Q. You were there for the Insurance Company of North America? A. Yes, sir.

Q. This spot that the caulkers missed: would you compare that to a little spot that a painter misses in painting a house? A. No, I wouldn't.

Q. Well, anyway, you agree that it is something that you will find quite frequently, that they will miss a little? A. Not frequently, but it does occur.

Q. It is known to occur? A. It has been known to occur, yes, sir.

Q. So for that reason after a vessel has been recaulked it is important to check her very carefully to see whether or not any such thing has occurred, isn't it? A. Yes, sir.

Q. I think you said in your testimony that this leakage in your opinion was not developed until the vessel had been loaded? A. I didn't say that it wouldn't develop at all. (486) I said that as pressure increases, the oakum or residue of oakum would have blown through or out of that seam into the hull of the boat.

Q. But would there have been some leakage all the time? A. No, not all the time.

Q. Well, will you explain it? I don't understand that. A. Yes. After that vessel was undocked at the shipyard I believe that to all appearances that seam was tight, and then——

Q. May I interrupt you? What do you mean to all appearances? You mean no water was coming in? A. No evidence of water coming in.

Q. Well, no water came in? A. No water came in.

Gustave Hansen, for Defendants—Cross.

Q. Because if water came in there would be evidence of it coming? A. Yes.

Q. Now, you want to say you believe no water came in through that seam? A. Yes.

Q. Even though the caulkers——

Mr. Kildare: He should be allowed to finish (487) the answer.

The Court: Did you finish the answer?

The Witness: Yes.

Q. Are you saying even though the caulkers had missed this spot, that no water came in? A. Yes, I agree with you.

Q. Now, go ahead. A. And then while the vessel was towed down to Wilmington, Delaware, and was brought to the dock, to the Wilmington Terminal, and loading began, I believe that some leakage must have developed as a result of the increased pressure that was put upon the bottom.

Q. May I interrupt you? You say loading began and you believe some leakage must have developed; during the course of loading do you mean? A. It could very well have occurred then, yes.

Q. That is when you would expect it? A. That is when I would be expecting it.

Q. In your opinion that is when this leakage began? A. It could very well have occurred then.

Q. So that an experienced and competent scow captain would discover a situation on the vessel of water coming in during the course of the loading? (488) A. I would say if he had made a careful inspection of the vessel he may have observed it.

Q. And he should have observed this if he made a careful inspection, shouldn't he? A. Yes, I would say that.

Q. And when a competent scow captain of a wooden scow observes water in the vessel, it is his duty to find

out where the water is coming from, isn't it? A. That is right.

Q. And it is also his duty to operate the pumps to expel the water from the boat, isn't that right? A. Yes, sir.

Q. And to stop the leakage as well as he can until the vessel can get to drydock to be fixed properly? A. Yes, sir.

Q. Is that right? A. Yes.

Q. Now, how would a scow captain go about stopping a leak of this kind?

Mr. Kildare: Pardon me, if the Court please: you mean while the vessel is at the dock loading or while the vessel is underway?

Mr. Heckman: Well, that brought something to my (489) mind:

Q. When a scow captain finds a leak in a boat during the course of loading, is it proper for him to allow the loading to continue? A. No, sir.

Q. And particularly when he hasn't discovered the source of the water coming in, he should stop the loading until he finds the source of the water, shouldn't he? A. That is right.

Q. Because, as you have testified, the additional cargo puts greater strain on the boat and will increase the water pressure? A. That is right.

Q. Now, then, during the course of loading if he does find a leak how would he go about stopping it? A. Well, he might—he could install some white pine shims in that seam to stop up the leak if the seam was wide enough.

Q. We are speaking now of the seam you are talking about; you estimated it on the inside to be one-eighth of an inch? A. He could have installed some white pine shims in there which would have at least slowed up the leak (490) considerably, if not almost have stopped the leak; or he could have gotten a piece of board and laid some

cotton around along the edges and at both ends and nail that piece of board right down on top of the two planks over the seam.

Q. He would do this from the inside? A. From the inside and then nail a wooden cleat against each keelson directly over that particular piece of board.

Q. You call those temporary repairs, don't you? A. That is right.

Q. You have seen such type of temporary repairs made by captains of any number of scows? A. Yes, and I have arranged for such repairs to be made, too.

Q. And even with no wood or hammer or nails available oakum could be forced into the seam from the inside, couldn't it? A. Well, I always considered that poor practice.

Q. If there were nothing else available? A. Well, an attempt could be made, and it has been done.

Q. That would be just this stuff that is in evidence here? (491) A. Yes.

Q. You have seen that done? A. Yes.

Q. A number of times? A. I have.

Q. And you have seen wooden scows where a leak has developed where somebody has taken a sheet off a bed or a man has taken off his shirt and jammed it into a small hole like this? A. Yes, and I have seen a bed mattress thrown over the bow of a boat to stop a leak.

Q. So, the developing of a leak in a wooden boat is very easily taken care of? A. That depends upon the leak.

Q. Well, the developing of a leak of this size? A. Yes.

Q. It depends on the captain, doesn't it? A. Indeed, it does.

Q. Have you ever been to the Wilmington Terminal? A. Yes, sir.

Q. Do you think there would be any difficulty in finding some wooden shims and hammers and nails and making a patch?

(491) Mr. Kildare: Oh, I will object to that, if (492) your Honor please. How can the man know that?

Mr. Heckman: Well, he has been there.

Q. From what you saw?

The Court: Objection overruled.

Q. From what you saw of it? A. I don't believe there would have been much difficulty in finding the necessary materials to do that job.

Q. Now, when you examine a scow for the insurance company, when your underwriter says he has been asked to insure a scow and you go to look at it, do you reject every scow that has any kind of leak in it irrespective of the size of the leak? A. No, sir.

Q. You have approved for insurance scows that you have observed to be leaking when you examined them? A. Leaking very slightly, yes, sir.

Q. And you wouldn't approve or recommend to your underwriters to insure a scow which in your opinion was unseaworthy? A. No, sir.

Q. In your opinion is a scow unseaworthy merely because she leaks to some extent? A. No, sir.

(493) Q. Whether or not she is seaworthy or unseaworthy depends on the amount that she leaks? A. That is correct.

Q. And if she leaks within the capacity of her pumps, then in your opinion she is seaworthy, isn't she? A. Well, I don't like to take a chance like that.

Q. Well, do you remember you were examined before in this case? A. Yes, sir.

Q. How are you answering this question? A. I don't remember.

Q. I mean now how are you answering it?

The Court: The question is whether or not if the leakage was within the capacity of the pumps.

Q. If the leakage was within the capacity of the pumps is she seaworthy? A. I would say that, yes.

Q. You would say she was seaworthy if the leakage was within the capacity of the pumps? A. Yes.

Q. Therefore as a result of your examinations you must have had a great deal of experience in determining the capacity of pumps? A. No, I haven't.

(494) Q. Well, now can you tell whether leakage is within the capacity of the pumps, of a vessel's pumps, unless you know the capacity of those pumps?

Mr. Kildare: I object to the form of that question because it calls for a general formula or appraisal of the sound condition. There was no specific reference to any particular pump on the vessel.

The Court: The witness could explain.

A. When I inspect a vessel I usually try to determine its condition and if I see any amount of leakage that is in that vessel, I as a rule report it to the owners and ask that that condition be corrected, but if there is any considerable amount of leakage, and even though a pump may have a capacity of four or five thousand gallons an hour, the leak that I observed might be considerably less than that, but I don't feel that it is safe for me to take a chance and approve that vessel for insurance because of the fact that I have a scow captain or barge captain to consider. They are not always dependable; they are not always on the job, and vessels frequently have been left unattended and sank as a result, and for that reason I have used my own judgment as to whether or not that vessel was an insurable risk.

(495) Q. You know that policies insure against damages due to the negligence of the scow captain, don't you?

Mr. Kildare: I will object to this unless this gentleman knows exactly what an insurance policy provides.

The Court: He can ask him.

Mr. Kildare: He is not in the underwriting end of it.

Mr. Heckman: If he knows.

The Witness: I am not familiar with the policy conditions.

Q. How many years have you been with the company? A. 29 years.

Q. Well, you have some knowledge about the capacity of the pumps, don't you? A. Just hearsay, yes.

Q. Mr. Bagger when he left yesterday said he would give you to bring here today his data on the capacity of handpumps. Do you remember him saying that? A. I recall that.

Q. Did he give it to you? A. No, sir.

Q. Did you call him and ask for it? (496) A. No, I didn't.

Q. You knew you were going to come back here to be cross examined? A. I knew that, yes.

Mr. Kildare: I don't remember that Mr. Bagger said he would give it to him. I object to this line of cross examination. The witness testified he would let Mr. Hansen know if he could find it if it was available. He explained his records might have been discarded in moving. I don't see why the examination proceeds on the theory that the witness is not telling the truth.

Mr. Heckman: I want to develop that he didn't ask Mr. Bagger for it.

Q. Did you ask Mr. Bagger for it? A. No, sir.

Q. Did you talk to Mr. Bagger at all? A. No, sir.

Q. Then he didn't talk to you either, of course? A. Of course.

Q. The whole thing was dropped? A. Well, I completely forgot it.

Q. Do you know the capacity of Trench & Marine pumps of various sizes? (497) A. Yes, sir.

Q. And are you familiar with the type of pump put out by the Trench & Marine Pump Company? A. Yes, sir.

Q. Do you consider them good pumps? A. Yes.

Q. They are probably the most commonly used pumps on scows, aren't they? A. Yes.

Q. And that is a reliable organization which has been furnishing pumps to vesselowners for years? A. That is correct.

Q. Have you found their capacity to be accurate and reliable? A. I have never checked them.

Q. Well, you have handled boats and you advise owners and you advise insurers, and a pump is a very important thing on a wooden vessel, isn't it? A. But I haven't done it.

Q. You never checked? A. No, sir.

Q. Have you ever seen them in operation? A. Oh, yes, many times.

Q. Are you familiar with the type of pumps shown (498) on the top of the page of Exhibit 4 for identification that I show you? A. Yes, sir, I have seen pumps like that before.

Q. Have you seen them on scows? A. Yes, sir.

Q. They are a common type to find on scows? A. Yes.

Q. Well, will you just put an arrow to the one to which you are referring? A. (Witness indicates.)

Q. You have put an arrow to the one marked Midget one and a half inch pump? A. That is right.

Mr. Kildare: If the Court please, I would like to have this understood now: we will object to any attempt to make use of this publication, whatever it is, except that the question arises as to the general description, from the standpoint of appearance. We certainly object to any attempt to insert one way or the other any specifications of that pump.

Mr. Heckman: One thing at a time. I am only asking one question at a time.

Gustave Hansen, for Defendants—Cross.

Q. Do you know Mr. Ed Todd of the McAllister (499) repair yard? A. Yes, sir.

Q. You have known him for a long time? A. Many years.

Q. If he said that the type of pump which you just marked as the type of pump that was on this scow when it went down to Wilmington, would you be willing to take his word for it?

Mr. Kildare: Objection, if your Honor please.

The Court: Objection sustained.

Q. This scow had two hand pumps on it when you saw it, didn't it? A. Yes, sir.

Q. And where was each one of them? A. As nearly as I can recall, one of them was at the starboard bow and the other one at the port stern.

Q. And you agreed that those pumps were damaged in the sinking and overturning? A. And the specifications called for overhaul of both pumps.

Q. Yes, the specifications that were either drawn or joined in by you? A. Yes.

Q. When you arrived at the total price which (500) in your opinion was the cost of repair you must have included some figure for the overhaul of those pumps? A. Yes, sir.

Q. And that overhaul you agreed was necessitated by the sinking? A. Yes, sir.

Q. Now, in order to have a price for the overhaul of the pumps I would think you had to know something about pumps? A. As far as the physical condition was concerned.

Q. Did you say what size pump it was? A. No, I didn't. I can't recall. I may have seen it, but I can't recall. I would assume it was either a three or four-inch hand pump of the Edson type.

Q. Each one? A. Yes.

Q. One at the bow? A. Yes.

Q. And one at the stern? A. Yes. They are usually that size.

Gustave Hansen, for Defendants—Cross.

Q. Will you agree that if this vessel had on board a one and a half inch Midget Trench & Marine gasoline pump and two three-inch hand pumps, that there was enough pumping capacity there to take care of the inflow (501) of water, as much as the highest gallonage that you gave in your testimony?

Mr. Kildare: If the Court please, we object to that.

The Court: If the witness knows he can answer.

Mr. Kildare: He testified he is not familiar with pumps.

The Court: He didn't say that. If he knows.

Q. You gave a figure. Your highest figure was 5520 gallons an hour? A. Yes, sir. Yes, I would think that they could.

Q. As a matter of fact, if any attempt to stop the leakage had been made the gas pump alone could easily have taken care of that, couldn't it?

Mr. Kildare: I object to that for the same reason.

The Court: Objection overruled. If he knows or has an opinion.

A. Yes, according to these figures given here.

Mr. Kildare: Oh, I will object to that for this reason: I think I have made it clear that we object to the use of this publication for any purpose.

The Court: Objection sustained on the figures. (502) If he knows from his own experience.

Mr. Heckman: It is cross examination.

The Court: I know it is. He says according to the figures. He is referring to a document not in evidence. If he knows whether the gasoline pump would have been adequate for the purpose you mentioned he can say that.

Mr. Kildare: Without regard to this paper?

The Court: Yes, without regard to this paper.

The Witness: I am not in a position to say from my own knowledge.

Mr. Kildare: If the Court please, we ask that the answers be stricken out which are based upon that.

The Court: Where he said according to this paper, that may be stricken out.

Q. I just want to see if I have it straight now: You examine vessels for insurance companies. You have been doing it for some 20-odd years, and a pump is an important part of a vessel, and you don't know anything about pump capacities, is that right? A. That is right.

Q. Is it a fact that according to your calculations it would take five hours for the water flowing in at the rate of 5520 gallons an hour to rise above the (503) keelsons of a vessel that is on an even keel? A. I didn't make those calculations. I don't know.

Q. Didn't you in your previous testimony that was previously taken in this case testify that you had adopted the same calculations as your own and were willing to accept them and that on the basis of those figures you yourself calculated that it would take five hours for the water to rise above the top of those keelsons on a scow that was riding level? A. I can't recall exactly what I said, but I believe that I did testify that those calculations had all been made by Mr. Finkenaur, from whom I had received them, and on the basis of those calculations I made my statement.

Q. The calculations are the ones to which Mr. Bagger testified yesterday, aren't they? A. Yes, sir.

Q. That is, a theoretical coefficient of 1, a coefficient of 9, 8, and so on? A. Yes.

Q. Is that right? A. That is right.

Q. And they result in your testimony today that (504) under a coefficient of 1 the inflow of water would be 5520

gallons an hour? A. I have accepted Mr. Bagger's figures, yes.

Q. Now, on those figures did you not testify that at that rate of inflow it would take five hours for enough water to come in the boat while riding level to rise above the top of those keelsons we were talking about? A. I believe I did.

Q. And that is the fact, isn't it? A. Yes, sir.

Q. That is would require five hours? A. That is right.

Q. Now, it was you who asked Mr. Bagger to make these calculations that he testified to yesterday? A. Yes, sir.

Q. Did you ask anyone to make any calculations about the capacity of the hand pumps? A. No, I didn't.

Q. Did you make any investigation to determine the capacity of the hand pumps or the gas pumps or both that were on that scow at the time? A. At what time?

Q. At the time of the sinking? (505) A. No, I did not.

Q. Did you make a report to your insurance company that the cause of this sinking was this little 18 inches out of that great big total that the caulkers missed when they were caulking the boat? A. Yes, sir.

Q. Now, you like to be precise, don't you? A. Yes, sir.

Q. Now, to be precise the cause of this sinking was water, wasn't it? A. That is right.

Q. And it was the water that accumulated in the boat? A. Yes, sir.

Q. Until it rose to a point where she had lost her stability? A. That is correct.

Q. Is that right? A. Yes.

Q. And when she lost her stability then she rocked from side to side? A. Yes, sir.

Q. And she threw some cargo overboard? A. So I understand.

(506) Q. And sustained this twisting you talk about? A. Yes.

Q. Now, the reason water accumulated in the boat was because it wasn't pumped out? A. That is right.

Q. So the cause of the sinking was the failure to discharge with the pump the water that accumulated in the boat?

Mr. Kildare: I certainly object to any attempt to characterize or limit it in that way. If my friend wants to say the cause of or contributing cause of——

The Court: The witness may answer if he knows.

The Witness: Would you repeat the question?

(Last question read.)

The Witness: That is what caused the sinking, yes, sir.

Q. And the sinking could have been prevented if there had been a captain there to operate the pumps and pump out the water as it came in?

Mr. Kildare: I still object to that, if your Honor please.

The Court: Objection overruled.

A. I believe so.

(507) Q. And the sinking could have been prevented if there had been a captain there to make some kind of patch which would stop the water from coming in? A. I believe so.

Q. And even if the water, even if the leak, if the little spots that the caulkers had missed allowed water to come in beyond the capacity of the pumps, the sinking could have been prevented if a patch had been put over it? A. Yes, if he had discovered it before a great amount of water was in the hull, so he could have gotten it out.

Q. And even if the patch didn't stop the entire leak it would certainly diminish the inflow of water, wouldn't it? A. I believe so, yes, sir.

Q. Did you hear the testimony that if the boat had gotten to Chester there were a hundred hands up there that would have assisted in saving that boat?

Mr. Kildare: Oh, if your Honor please, that is not the testimony.

The Court: I don't recall that this witness said that.

Mr. Heckman: No. Mr. Kildare asked him if (508) he heard other people's testimony. Now I am asking if he heard that testimony.

Mr. Kildare: I am sorry, sir. I think I recall what they were talking about. They were talking about removing other vessels out of the way of the dock.

The Court: If the witness heard the testimony he can say so.

The Witness: It seems to me I heard that said, testified to yesterday.

Q. Did you hear the tug captain testify yesterday that he saw water coming in the starboard side of this vessel? A. I heard him testify to that.

Q. You didn't see any place on the starboard side where water could have come in? A. I saw no evidence of it, no, sir.

Q. When did you receive the telephone call from the insurance company underwriter asking you about this scow prior to the sinking? A. I don't know exactly what day it was, but it must have been somewhere around the 26th of August.

Q. Well, is it your best recollection that it was on August 26th? (509) A. Well, the only way in which I can recall the date of the conversation is that I did speak to Eddie Todd after I had received a request from my office regarding the vessel, and I talked to him on the phone, and as nearly as I can recall he said that the vessel had either left New York for Wilmington or was already down there, but I know that the vessel was not available for an inspection up here.

Q. Well, the call made was from an underwriter in Philadelphia? A. Yes, sir.

Q. How far is that from Wilmington, roughly? A. 25 miles.

Q. And the Insurance Company of North America has other surveyors on its staff besides you, doesn't it? A. Not to do their hull work.

Q. Well, if your company is asked to survey a boat, if it is outside of New York, do you just use the telephone, or do you go and look at the scow? A. Very often I go and look at it.

Q. If you had been told at noon on August 26th when this insurance attached that the scow was at Wilmington, you could have gone down there and examined her if you chose, couldn't you? (510) A. Yes, I could have.

Q. If you had made an examination of this boat at Wilmington before any loading was started, do you think that you could have found this condition of the little spots that the caulkers missed? A. I may have found evidence of leakage there, yes.

Q. Before any loading? A. Yes.

Mr. Kildare: I don't think the answer is responsive. It is not responsive.

Mr. Heckman: I agree. I would like an answer, too.

The Witness: I wouldn't have been able to see the actual condition because that could only have been seen on drydock, but I may have been able to see some evidence of leakage.

Q. If it was then leaking? A. If it was then leaking.

Q. As I understand your testimony, it probably didn't begin to leak until they began to load it? A. That is quite possible.

Q. So the most diligent examination before loading began would not have disclosed this condition you talk (511) about.

Gustave Hansen, for Defendants—Cross.

Mr. Kildare: Again I must ask if my friend will say when he is talking about.

Q. After the shipyard had given the boat back to the owner and before any loading of this vessel had begun, a diligent examination of the vessel would not have disclosed the condition, would it? A. Probably not.

Q. Would you say that that was a latent condition? A. Latent?

Q. Yes. A. Hidden.

Q. After the vessel had been floated off the drydock would you say that it was a latent condition? A. That was a latent—hidden condition.

Q. Are you using latent and hidden— A. No, I am not using them the same.

Q. So, would you say that was a latent defect? A. No, I wouldn't call it that.

Q. Would you say it was a defect? A. Yes.

Q. And it was hidden, wasn't it? A. Yes, it was.

Q. So, you use the words "latent" and "hidden" the (512) same? A. Yes.

Q. So it was a latent defect? A. Yes, but the simple term is hidden.

Mr. Kildare: Insofar as this may have some bearing on any interpretation of a clause of the contract, that is for the Court, not the witness.

The Court: In admiralty terms, the witness could say what the distinction between hidden and latent is.

Mr. Heckman: I have just a couple of other questions.

Q. As a vessel gets along in service, a plank here and there will begin to show some rot, is that so? A. Yes, sir.

Q. And in time that plank has to be replaced? A. Yes.

Q. And if the owner is not ready to replace it immediately it is usual and customary to put an upright post behind the rotten spot, isn't that right? A. Oh, no, sir.

Gustave Hansen, for Defendants—Cross.

Q. Well, you said that you saw a rotten spot in a port side plank behind the kingpost? (513) A. That is right.

Q. Now, a kingpost is one of the upright parts of the vessel? A. Yes, that is right.

Q. Which runs from the strength member on the bottom to the strength member up on top? A. That is right.

Q. And it supports the sides? A. That is right.

Q. And their fastenings go through this kingpost? A. Screw bolt fastenings.

Q. And it is around these fastenings that rot often begins? A. Well, frequently it does. More often the decay starts at one of the edges of the planks.

Q. In 1953 how much did it cost to install such a plank? A. In 1953 to install such a plank like that would be about $10 a running foot.

Q. The planks run about 30 feet long? A. No. That is an old boat. The planks would probably run 34 to 36 feet in length.

Q. She was built in the good old days when they could get long lengths of wood? (514) A. Yellow pine, well seasoned lumber.

Q. One of the best built boats is a yellow pine boat, isn't it? A. Yes.

Q. This $55,000 replacement cost you talk about wasn't for a yellow pine boat; it was for a fir boat? A. That was a fir boat.

Q. And the fir is not considered to be as good as yellow pine in the construction of a boat of this kind? A. Not quite.

Q. Then you allowed a certain figure for annual depreciation, didn't you? A. Yes, sir.

Q. Did you make any allowance for improvements made by the owner of the vessel since the owner acquired it? A. Well, I didn't make any allowance for the improvements because I took into consideration the overall condition of the vessel and its age and the service expectancy in number of years that the vessel had.

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Edward Todd, for Plaintiff—Direct.

(529) EDWARD TODD, called as a witness on behalf of the plaintiff in rebuttal, being duly sworn, testified as follows:

Direct examination by Mr. Heckman:

(529) Q. Did you have anything to do with placing a gasoline pump aboard the scow? A. I ordered it placed aboard.

Q. Do you know that it was placed aboard? A. It was. I saw it on there and I saw it operating after it was placed aboard.

Q. Do you know what kind of pump it was? (530) A. Trench & Marine Midget.

Q. How do you describe that in size? A. An inch and a half pump.

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A. Most of those gas pumps, when they talk of size, they mean the size of the suction hose.

Q. Is that what you meant when you said an inch and a half pump? A. Yes.

* * * * * *

(532) Q. Do you know whether or not this type of pump put on *McAllister 58* is a common type of pump for scows of that size? A. Yes, it is.

Q. Have you investigated the capacity of the pump? A. Yes, I have.

Q. And how have you investigated the capacity of a pump of that size? A. Well, over at the yard we repair tugs and barges. We have no drydocks there. During the course of the work several times we have to calibrate tanks, (533) especially on the tugs, and we use pumps to pump the tanks full of water. We wanted to know how long it took to do it. I remember distinctly pumping 22,000 gallons in just about four hours, a little over four hours; maybe four hours and ten minutes with one of these pumps.

The Court: How many gallons?

The Witness: 22,000, sir.

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Q. When you say you pumped up these tanks, will you tell us what kind of pump you used? A. We had an inch and a half Trench & Marine. We have had offhand, I would say, 20 of them go through our yard. We order them and stock them, to have them when we need them. They go out on the boats. We use them for other work in the yard too. We standardized on the Trench & Marine, the same type of pump.

Q. The same type of pump that was on the *McAllister 58*? (534) A. Yes.

Q. And based on those tests you made what was the hourly capacity in gallons?

Mr. Kildare: Objection unless it was this pump.

The Court: This type of pump?

Mr. Kildare: Unless it was this pump. After all, pumps differ.

The Court: Objection overruled.

A. I would say 5000 gallons an hour.

Q. Do you know whether or not there were other pumps on board the scow *McAllister 58* at the time she set out for Wilmington in addition to the gasoline pump you have just described? A. Yes, sir. There were two hand pumps there.

Q. Was there one at the forward corner and one at the stern corner, as Mr. Hansen testified? A. Yes. They are at diagonal corners. I don't remember which.

Q. Were they in working condition? A. Yes.

Q. How do you know? A. They tried those pumps while the boat was in the yard.

(535) Q. And what size pumps were those? A. Three-inch.

Edward Todd, for Plaintiff—Direct.

Q. Each one was a three-inch pump? A. Yes.

Q. What do you say about the capacity of those pumps? A. They normally pump around three to four thousand gallons an hour each, according to how fast you work them.

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Q. The testimony is that in the opinion of these insurance company surveyors, water came in through an opening not more than one-eighth of an inch wide and about 10 inches long. In your experience have you seen vessels which have sustained an opening in a seam as large or larger than that? (536) A. Yes, I have.

Q. And have you seen the effect of using a pump, similar to the pump that was on the *McAllister 58*, in relation to the water that was coming in through that seam? A. Yes.

Q. Can you state whether or not such a pump will expel the amount of water that was coming in through such an opening? A. Yes, it will.

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Excerpts From Court's Charge.

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(591) Mr. Kildare: I think it would be well for the Court to state as a matter of law what the definition of seaworthiness is.

The Court: What do you say it is?

(592) Mr. Kildare: I say it is a condition in which the vessel is reasonably fit and adequate for the purpose for which it is intended.

Mr. Heckman: Reasonably fit?

Mr. Kildare: Reasonably fit and adequate for the purpose for which it is intended.

Mr. Heckman: All right.

The Court: You request that I give that?

(Addressing jury) Ladies and gentlemen, counsel have also called my attention to the fact that you may be interested in knowing what constituted seaworthiness on the part of the vessel, and they have given what I regard as a very good definition, and that is that it must be reasonably fit for the purpose for which it was intended, and capable of performing the purpose for which it was intended.

Mr. Kildare: That is a legal definition rather than some witness' opinion of what the definition is.

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Excerpts From Plaintiff's Interrogatories to Defendant Scott Paper Company, and Answers Thereto.

(645) 1. Was the scow *McAllister #58* delivered by plaintiff to defendant Scott Paper Company at the pier, wharf or bulkhead of the Wilmington Marine Terminal, Wilmington, Delaware, on the early morning of August 27th, 1953?

(650) 1. No.

Excerpts From Plaintiff's Interrogatories to Defendant Scott Paper Company.

2. If your answer to the foregoing interrogatory is in the negative, state when and where the scow *McAllister #58* was delivered to defendant Scott Paper Company.

2. At Wilmington Marine Terminal, Wilmington, Delaware, on Wednesday, August 26, 1953 about noon, when Alexander Carter inspected the scow after being notified by the terminal officials that the vessel had arrived the night before at 10:30 P. M.

3. Was an examination of the scow *McAllister #58*, below deck, made by an employee or employees of defendant Scott Paper Company while said scow was lying at the Wilmington Marine Terminal property, Wilmington, Delaware, on the morning of August 27th, 1953?

3. Yes.

4. Was any cargo shipped by defendant Scott Paper Company loaded aboard the scow *McAllister #58* after an examination of that scow below deck was made by an employee or employees of defendant Scott Paper Company, on August 27th, 1953?

4. Yes.

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(646) 12. Was Samuel Church an employee of defendant Scott Paper Company on August 27th, 1953?

(651) 12. Yes.

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(647) 16. Was Samuel Church discharged by the defendant Scott Paper Company late on August 27th, 1953 or early on August 28th, 1953?

16. Yes, Church was discharged about noon on August 28, 1953.

Excerpts From Defendant Scott Paper Company's Answer to Interrogatories.

17. Was Samuel Church discharged by Scott Paper Company because he failed to accompany the scow *McAllister #58* while in tow of the tug en route from Wilmington, Delaware to Chester, Pennsylvania?

(652) 17. Yes.

18. Did defendant Scott Paper Company, on August 27th, 1953, use the scow *McAllister #58* for receiving a cargo owned by defendant Scott Paper Company intended to be transported from Wilmington, Delaware to Chester, Pennsylvania?

18. Yes.

19. Did defendant Scott Paper Company return the scow *McAllister #58* to plaintiff in the same condition in which said scow was at the time loading of cargo on board her commenced, on August 27th, 1953?

19. No, because she had filled and sunk in calm water while being towed from Wilmington to Chester, without negligence on the part of Scott Paper Company or any persons for whom Scott Paper Company would be legally responsible.

20. Did defendant Scott Paper Company return the scow *McAllister #58* to plaintiff in the same condition as she was at the time she was examined by an employee of defendant Scott Paper Company, on August 27th, 1953?

20. No, for the reason above stated.

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(648) 22. If in answer to a preceding interrogatory you state that the scow *McAllister #58* was not in the same condition when returned to plaintiff as she was when examined by a Scott Paper Company employee or when

Excerpts From Defendant Scott Paper Company's Answer to Interrogatories.

loading began on August 27th, 1953, state the cost, as estimated by you or on your behalf, of restoring the scow to the said condition.

(653) 22. $23,456.00.

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24. When did defendant Scott Paper Company return the scow *McAllister #58* to plaintiff?

24. Salvage operations were completed and the vessel was delivered to Quigley Shipyard on September 4, 1953, after conferences between plaintiff and defendant in which it was agreed that defendant would undertake the salvage operations. It is therefore the opinion of this defendant that the vessel was "returned" to plaintiff on September 4, 1953.

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